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No. 95-1872

In the

Supreme Court of the United States

October Term, 1996

THE HONORABLE WILLIAM STRATE, ASSOCIATE TRIBAL JUDGE OF THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION; THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION; LYNDON BENEDICT FREDERICKS; KENNETH LEE FREDERICKS; PAUL JONAS FREDERICKS; HANS CHRISTIAN FREDERICKS; JEB PIUS FREDERICKS; GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS and LYLE STOCKERT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* THE YAVAPAI-APACHE NATION, SHOSHONE TRIBE OF THE WIND RIVER INDIAN RESERVATION, AND LUMMI NATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

This case poses one of the greatest threats to tribal sovereignty in recent history. American jurisprudence characterizes Indian tribes as "domestic dependent nations."[2] It is a difficult task, unique among our legal constructs, to balance the "dependent" and the sovereign nation aspects of that characterization. Wrestling with these issues, a sharply divided *en banc* Eighth Circuit Court of Appeals has enunciated a rule that emasculates tribal sovereignty. It need not have done so, since the facts before it clearly supported tribal court jurisdiction under prevailing law. If this Court sustains the ruling below, every Indian tribe in this country will lose an integral aspect of what makes it a sovereign government: the ability to regulate the conduct of all persons acting within its territory and the ability of all such persons to enjoy the benefits of a civilized society provided by these tribal governments.

Amici Curiae Yavapai-Apache Nation, Shoshone Tribe of the Wind River Reservation, and the Lummi Nation ("*amici*") are federally-recognized Indian tribes and submit this brief in support of Petitioners. *Amici* have been vested with tribal powers by treaty, statute, and inherent sovereignty to occupy and govern designated reservation territories. They exercise governance over their respective territories by providing essential governmental services, such as police and fire service protection, emergency medical services, and competent tribal court forums, to all persons conducting personal and business affairs within the exterior boundaries of their reservations.

The tribal *amici* have established tribal courts with jurisdiction to adjudicate civil disputes arising within their territory. *Amici* exercise tribal court jurisdiction over non-members involved in disputes arising within their reservations to varying degrees, but each ensures the protection of the rights of members and non-members in

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[1]Pursuant to Supreme Court Rule 37(3)(a), the written consent of counsel for both the Petitioners and the Respondents is submitted for filing herewith.

[2]Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

accordance with the Indian Civil Rights Act ("ICRA").[3] The availability of a tribal court forum to resolve disputes arising within the Tribes' territorial jurisdiction is of crucial importance to members and non-members alike. Significantly, Petitioners do not seek exclusive jurisdiction,[4] and *amici* do not urge a rule that would require such a result. Neither Petitioners nor *amici* seek authority to exercise civil jurisdiction over non-members in an arbitrary, abusive, or discriminatory manner.[5] However, the ability to exercise jurisdiction over disputes arising within their territory, regardless of the membership status of the litigants or parties involved directly in the dispute, is an essential attribute of tribal sovereignty and self-government. No other government in our federal system is deprived of the ability to establish and enforce rules governing the territory over which it has responsibility based on the race of persons. Tribal governments should be treated no differently. Such a fundamental, essential power cannot be diminished unless Congress affirmatively divests tribes of the power to exercise such jurisdiction over particular matters.

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[3]25 U.S.C. §§ 1301 *et seq.* (1996 Supp.).

[4]The Three Affiliated Tribes of the Fort Berthold Indian Reservation ("Three Tribes") Tribal Court seeks only concurrent, not exclusive, jurisdiction over the tort action. Petition for a Writ of Certiorari at 6 n.7.

[5]Indian tribes exercise their jurisdiction responsibly and in accordance with the law. *Amici* refer this Court to the 1985 survey of tribal courts compiled by the Bureau of Indian Affairs, the federal agency designated to oversee tribal relations with the federal government, regarding tribal court systems. This 1985 survey documents tribal compliance with the Indian Civil Rights Act, particularly the equal protection and due process requirements of the Act, and the varying degrees to which tribes exercise jurisdiction over non-members. Some tribes choose to limit their courts' jurisdictional reach to tribal members. Others exercise jurisdiction over both members and non-members. *See* Law and Order Code of the Three Affiliated Tribes of the Fort Berthold Reservation, Ch. 1, § 3.2; Law and Order Code of the Shoshone Tribe of the Wind River Indian Reservation ("Shoshone Code"), Ch. 2, §§ 1-2-1 through 1-2-5. Some provide for the inclusion of non-members in their jury pools. *See* Shoshone Code, Ch. 16, § 1-6-1; Zuni Tribal Code, Ch. 6, § 1-6-1.

Each of the *amici* has large numbers of non-members residing and/or visiting within the exterior boundaries of its reservation. Members and non-members mingle inextricably at work, at home, in commerce, and in transit. They live under the same roofs and on adjoining lots. Not least because it is governmentally inefficient and politically counterproductive to treat members and non-members differently, each of the *amici* has chosen to exercise its jurisdiction over such non-members and to provide governmental services to them. The specific interest of each *amicus* tribe follows:

The Yavapai-Apache Nation. The Yavapai-Apache Nation occupies and governs four reservation parcels located in northern Arizona. Approximately 15% of the population residing within the exterior boundaries of the Reservation are non-members. The Yavapai-Apache Nation operates various commercial enterprises on its Reservation, including the Cliff Castle Casino and Montezuma Visitors' Center, which employ non-member residents and attract many non-member patrons. The Yavapai-Apache Nation provides territorial governance that benefits all persons who enter the Reservation, regardless of membership or residency status. Specifically, the Yavapai-Apache Nation maintains roads, provides a sewage system, and protects its water, environment, and other natural resources.[6] Similarly, the Yavapai-Apache Nation affords police protection, fire department services, and emergency medical treatment for the health and safety of all persons who enter the Reservation, regardless of membership or residency. The Nation's tort remedies procedure contains a limited waiver of sovereign immunity, thereby permitting both members and non-members to sue for damages arising from torts committed at the Cliff Castle Casino. Yavapai-Apache Nation Tort Remedies Procedures, § 5.

The Yavapai-Apache Nation has established a competent, impartial court system, which is available to members and non-members involved in disputes arising within the Reservation

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[6]For instance, the Nation recently achieved a Class I air quality designation from the Environmental Protection Agency for the Reservation, which designation benefits all persons residing and entering the Reservation.

boundaries. The Nation's Constitution preserves the integrity of the tribal court system by establishing a judicial branch of government composed of the Tribal Court and a Court of Appeals, with powers that are separate and independent from the legislative and executive branches of the tribal government. Yavapai-Apache Constitution, Article III, Section 1. The Yavapai-Apache Nation does not exercise civil adjudicatory jurisdiction over non-members unless the non-member consents in writing. Yavapai-Apache Nation Civil Actions, Ch. 2, § 2.1. However, while the Nation has thus far chosen not to exercise civil jurisdiction over non-members without their written consent, the Tribal Court's authority to exercise concurrent jurisdiction over non-member litigants who voluntarily enter tribal territory for personal or business purposes is essential to the Nation and within its jurisdictional powers.

The Shoshone Tribe of the Wind River Reservation ("Shoshone"). The Shoshone occupy a reservation located in the State of Wyoming. Approximately 5,676 members reside within the exterior boundaries of the Reservation.[7] Over 74% of the Reservation residents are non-members (16,175 of 21,851). However, the vast majority of those are non-member Indians, are married to members, work for the Tribe either as employees or contractors, or have economic and other relations with the Tribe, such as lessees, vendors, customers, or recipients of tribally funded services. In addition, a significant number of non-member non-residents frequent the Reservation and interact with the Tribe at various levels because of its location and economic development (mineral, agricultural, and tourism).

Regardless of membership or residency, all persons on the Reservation receive the benefits and privileges afforded by Shoshone governance of its territory. Specifically, the Shoshone provide roads, courts, wildlife, management, environmental protection, water rights administration, and pre-school education services. Shoshone laws protect members and non-members alike in areas of domestic relations, commercial transactions, safety, health, civil rights, housing,

[7]The Reservation is shared and jointly governed with the Northern Arapaho Tribe. Figures given here include members of both Tribes subject to the jurisdiction of the joint Tribal Court.

trespass, and liquor. Many of such laws are more protective of individual and business rights than comparable state law.

The Shoshone have established a tribal court system, governed by a comprehensive Law and Order Code. The Law and Order Code delineates the court's authority, which provides a forum for members and non-members to resolve disputes arising on the Reservation in accordance with equal protection and due process requirements of the ICRA. Law and Order Code of the Wind River Reservation, Title 1, Ch. 1. In fact, non-Indians have demonstrated extraordinary confidence in the Tribal Court: in 1995, non-Indians commenced 116 civil actions in the Tribal Court (while non-Indians were made defendants in only 19 cases). Non-Indian parties before the Tribal Court have included some of the largest oil companies in this country, the State of Wyoming, and nationwide lenders. Thus, Shoshone asserts an interest in this case on behalf of its members and the non-members who depend on the Shoshone Tribal Court to administer justice throughout the Reservation.

The Lummi Nation. The Lummi Reservation is located on the coast of the State of Washington. Approximately 49% of the population residing within the exterior boundaries of the Lummi Reservation are non-members. The Lummi government provides various services that benefit all persons who enter the Reservation for domestic or commercial purposes, regardless of membership or residency. Because the Lummi Reservation is situated on coastal waters, the tribal government expends a large portion of its governmental resources to preserve the Reservation's natural resources. The Nation commits substantial governmental resources to administer and protect the Reservation's surface and ground water resources, which are particularly vulnerable to degradation and depletion due to the contamination of surface waters by up-stream, off-reservation activities; by salt water intrusion due to the intruding coastal waters; and by over-development of fee lands owned by non-members. The laws of the Lummi Nation require the involvement and participation of non-members in the tribal government's management of its water resources, because non-member use, both on- and off-reservation, has tremendous impacts upon the on-reservation water resources. For example, the Lummi Nation's Water and Sewer Code provides that two of the five members of the

Lummi Water and Sewer Board be elected by a vote of all Reservation residents, regardless of tribal membership. Currently, two non-Indians serve on this Board.

The Lummi Nation provides a competent court system, availabie to members and non-members alike. The Nation ensures the integrity of its court system through its Law and Order Code and Civil Rules of Procedure. Thus, the authority of the Lummi Tribal Court to exercise concurrent jurisdiction over non-member litigants who voluntarily enter tribal territory for personal or business purposes is essential to the Lummi Nation and within its jurisdictional powers.

SUMMARY OF ARGUMENT

The Eighth Circuit's decision flies in the face of one hundred and fifty years of decisions by this Court preserving tribal sovereignty. (Pt. I). Over the years, this Court's determinations of tribal jurisdiction have steadfastly recognized one fundamental rule: civil jurisdiction over the activities of non-members within the exterior boundaries of reservation lands lies with the tribe designated to occupy and govern that territory, unless expressly divested by Congress in a specific treaty or federal statute. In perpetuating this fundamental rule, the Court continues to reaffirm the territorial nature and scope of tribal powers that have existed, uninterrupted, since time immemorial, whether vested by treaty, statute, or inherent sovereignty. These territorial powers give tribes the authority to exercise legislative and judicial civil jurisdiction over non-members within the boundaries of the reservation, unless Congress affirmatively withdraws a specific tribal power that divests tribes of jurisdiction over a particular matter.

In this case, the Three Affiliated Tribes of the Fort Berthold Reservation ("Three Tribes") have the requisite territorial interest in and power to exercise civil jurisdiction over tort actions involving non-members on the state highway in question. That highway was established on tribal trust lands under a federal right-of-way statute that did not divest tribes of the power to adjudicate disputes involving tort actions arising on the state highway. The mere fact that the underlying incident involved non-members is not controlling.

Thus, the Three Tribes have authority to exercise concurrent civil jurisdiction over Mrs. Fredericks' tort action.

The Eighth Circuit's decision stands opposed to the full weight of this Court's historical view of tribal jurisdiction. Given the particular facts of the case below, it is wrongly decided under its primary authority, Montana v. United States, even assuming (which *amici* do not) that the Eighth Circuit's reading of Montana is correct. (Pt. IIA). First, the facts in this case amply meet both of Montana's so-called "exceptions" and the Eighth Circuit's new hybrid test, since they more than sufficiently implicate a "valid tribal interest." Thus, on the facts alone, this case meets all of the articulated standards for tribal jurisdiction and should have been decided differently.

Finally, even were this case rightly decided under the Eighth Circuit's view of Montana, that view is incorrect. (Pt. IIB). Montana has been interpreted in a far more expansive manner than necessary. Montana does not stand as controlling precedent for all determinations of tribal civil jurisdiction over non-members. Unfortunately, the unnecessarily broad language used to achieve the Court's relatively narrow holding has led many courts to misinterpret and misapply Montana in this manner, creating confusion and uncertainty in the law and a virtual paralysis of tribal governments' ability meaningfully to protect reservation citizens and resources.

Montana did not arise in a vacuum, and it cannot be applied slavishly every time a non-tribal member is brought before a duly constituted tribal court. This Court should clarify its earlier holding by replacing the ever-expanding myth of Montana with a more narrowly stated rule properly reflecting the facts of that case and precedent. If such a reconciliation is impossible, *amici* submit that Montana must be re-examined and replaced with a rule that frankly acknowledges tribal jurisdiction over all persons in the tribal territory as the presumptive norm.

ARGUMENT

POINT I
MORE THAN A CENTURY AND A HALF OF SUPREME COURT PRECEDENT RECOGNIZES THAT, ABSENT

CONGRESSIONAL DIVESTITURE OR VERY NARROW INSTANCES OF JUDICIAL LIMITATION, TRIBES RETAIN BROAD INHERENT SOVEREIGN POWERS OVER ALL PERSONS AND ACTIVITIES WITHIN THEIR RESERVATION TERRITORIES

This Court historically has recognized the territorial scope of tribal jurisdiction and has established a fundamental rule of tribal sovereignty: tribes have the power to exercise jurisdiction over all persons within their reservation boundaries, including non-members, unless Congress affirmatively withdraws specific tribal powers in a treaty or a federal statute. For more than one hundred and fifty years, it has been recognized that tribes retain the powers of government that they possessed at the time of their incorporation into the United States. Tribes did not lose their inherent powers upon becoming "domestic dependent nations." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832). Specifically, tribes have the inherent sovereign power to govern "both their members *and their territory*." United States v. Wheeler, 435 U.S. 313, 323 (1978)(emphasis added), quoting United States v. Mazurie, 419 U.S. 544, 557 (1975), citing Worcester v. Georgia, 31 U.S. at 557; see also Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987). Inherent territorial powers also give tribes the authority to exercise jurisdiction over non-members within reservation boundaries. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980); Williams v. Lee, 358 U.S. 217 (1959); see also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

Time and again, this Court has reaffirmed these fundamental Indian law principles. The Court has recognized that only Congress, in appropriate circumstances, can abrogate inherent tribal sovereign power, and it may do so only by express and unambiguous statement. Williams v. Lee, 358 U.S. at 223; Wheeler, 435 U.S. at 322-23; South Dakota v. Bourland, 508 U.S. at 679, 687 (1993) (citations omitted). It is the role of Congress, not the courts, to alter tribal sovereign authority. Tribal powers exist at the sufferance of Congress. Wheeler, 435 U.S. at 323. This Court will not find that Congress

divested tribes of inherent sovereign powers unless the congressional act contains an explicit divestiture. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978). Indeed, this Court has "consistently guarded the authority of Indian governments over their reservation. If this power is to be taken away from them, it is for Congress to do." Williams v. Lee, 358 U.S. at 223.

In determining whether Congress intended to abrogate tribal powers, this Court requires deference to Congress's "longstanding policy of encouraging tribal self-government." Iowa Mutual, 480 U.S. at 14, citing Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890 (1986); Merrion, 455 U.S. at 138; White Mountain Apache Tribe v. Bracker, 448 U.S. at 143-44 and n.10; Williams v. Lee, 358 U.S. at 220-21. A "proper respect for both tribal sovereignty itself and for the plenary authority of Congress in this area cautions that [this Court] tread lightly in the absence of clear indications of legislative intent." Santa Clara Pueblo, 436 U.S. at 60. Congress has the ability to act expeditiously to address any concerns it may have regarding the exercise of tribes' sovereign powers, and Congress should be left free to make these important federal policy determinations.

As this Court has recognized, Congress has occasionally stepped in to protect individual liberties and overriding national interests on Indian reservations. Directly relevant here, and discussed *infra* at 28-30, Congress intervened in tribal governance when it enacted the Indian Civil Rights Act, which imposed upon tribes most of the protections contained in the Bill of Rights. 25 U.S.C. §§ 1301 *et seq.* (1996 Supp.).[8] Congress also has extended various environmental laws and regulations to reservations, thereby protecting national

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[8]Acknowledging the protections afforded by the Act to individuals subject to tribal court or regulatory jurisdiction, this Court has recognized that Congress views the administration of justice through tribal forums as an essential attribute of tribal sovereignty. Thus, Congress did not intend to waive tribal sovereign immunity from suit in the Act so that claims under the Act could be heard in federal courts, but, rather, intended to have tribal forums adjudicate such claims. Santa Clara Pueblo, 436 U.S. at 58-59.

interests while reaffirming tribal sovereign authority.[9] However, based upon the federal government's policy promoting tribal self-government and the tribal governments' initiatives to develop administrative and personnel resources capable of undertaking the responsibilities of comprehensive territorial management, even Congress has favored a "hands off" approach with regard to tribal sovereignty.[10]

Notwithstanding Congress's sole authority to divest tribes of their sovereign powers, this Court has, in three unique circumstances, determined that, by virtue of tribes' dependent status, the exercise of specific tribal sovereign powers is not "inherent" to tribes because the exercise of these particular powers is "necessarily inconsistent" with preserving the sovereignty of the United States. Colville, 447 U.S. at 153-54; Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978). First, by submitting to the overriding sovereignty of the United States, Indian tribes necessarily gave up their power to alienate the land they occupy to non-Indians without federal consent. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823). Second, tribes also gave up their right to enter into direct commercial or governmental relations with foreign nations. Worcester v. Georgia, 31 U.S. at 559. More recently, this Court added a third inherent

[9]*See* 33 U.S.C. § 1377 (permits Environmental Protection Agency to approve Clean Water Act programs for tribal governments); 42 U.S.C. § 7601(d) (Clean Air Act expressly authorizes Environmental Protection Agency to treat tribes as states for federal air protection programs, and tribal jurisdiction over air resources encompasses all lands within reservation boundaries); 42 U.S.C. §§ 300j-11(a)(1), 300h-1(e) (Safe Drinking Water Act allows tribes to be treated as states, which permits the Environmental Protection Agency to approve tribes' primary enforcement responsibility for public water systems and underground injection programs); 40 C.F.R. 171.10 (under Federal Insecticide and Rodenticide Act, the Environmental Protection Agency may approve tribes' authority to operate pesticide application certification programs).

[10]Indeed, Congress has acted affirmatively and decisively to protect tribal sovereignty by making clear that tribes have authority to prosecute and convict non-member Indians. 25 U.S.C. §§ 1302(2), (3), and (4) (1996 Supp.)

limitation on tribal powers: by submitting to the overriding sovereignty of the United States, tribes gave up the right to prosecute criminally non-Indians in tribal courts that do not accord the full protections of the Bill of Rights. Oliphant, 435 U.S. at 210.

This Court deemed the exercise of these three very specific powers as "necessarily inconsistent" with tribes' "dependent status," because unbridled exercise of these powers could undermine and threaten the overriding interests of the United States as the "guardian" sovereign.[11] The judicial implicit divestiture of tribal powers in these few instances is a drastic result and should be expanded no further. As noted above, if Congress sees fit, it has the authority to modify tribal authority. In the absence of congressional action, all other inherent sovereign powers of tribes over their reservations remain intact.

Consistent with congressional restraint and narrow circumstances inviting judicial intervention, since at least the time of Chief Justice Marshall, with the possible exception of one case,[12] this Court has recognized tribal authority to exercise civil jurisdiction, regulatory and adjudicatory, over non-members who choose to enter the reservation to conduct personal or business affairs. In the case at bar, the Eighth Circuit majority appears to eliminate congressional desires from the equation. Specifically, it seems to urge a *per se* rule, that tribal jurisdiction over non-members has been implicitly divested by virtue of conquest. This cannot be a proper reading of this Court's precedent or congressional intent. Conquest had been accomplished fully by the time Worcester was decided, yet Chief Justice Marshall recognized and firmly upheld tribal sovereignty and jurisdiction over any person within tribal territory. Worcester v. Georgia, 31 U.S. at 560-62. It is true, as this Court ruled in Montana, that a tribe may not, by regulation, essentially exclude non-members from lands they

[11]This Court has made clear that tribes are dependent upon, and subordinate to, *only* the federal government; thus, tribal powers may not be limited on the ground that *state* interests are frustrated or undermined by the exercise of tribal power. Colville, 447 U.S. at 154.

[12]Montana v. United States, 450 U.S. 544 (1981), is discussed in detail *infra* at Point II.

own in fee, or otherwise act contrary to overriding national interests. Nonetheless, tribes rarely should be found to lack proper authority to govern their reservations, as their essential power has not been disturbed by Congress and is not *per se* inconsistent with overriding national interests.

A. Tribal Adjudicatory Jurisdiction. This Court has often upheld the exercise of tribal adjudicatory jurisdiction over non-members within reservation boundaries. For instance, in Williams v. Lee, 358 U.S. 217 (1959), the question was whether the Arizona state court or the Navajo tribal court had jurisdiction over a non-Indian's suit to enforce a debt owed from purchases made on the Reservation. Drawing upon the principles of tribal sovereignty established in Worcester v. Georgia, the Court recognized the "right of reservation Indians to make their own laws and be ruled by them," concluding that the Navajo Nation had the authority to adjudicate disputes arising from the on-reservation affairs of non-Indians. 358 U.S. at 218-23. Therefore, where the non-Indian transacted business with an Indian on the reservation, the tribe had the power to exercise civil jurisdiction over the dispute; it was "immaterial" that one of the parties was a non-Indian. Id. at 223. Finding no congressional action explicitly divesting tribal authority, this Court held that the Navajo tribal court had jurisdiction over the dispute. Id. at 222.

Two recent cases, while offering some guidance on tribal jurisdiction over civil actions arising within the reservation involving non-members, held that the existence of tribal court jurisdiction was to be determined by the tribal court in the first instance. In National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985), an action was brought against a public school by the guardian of a Crow tribal member who was struck by a vehicle on school grounds. The school was located on fee land owned by the State within the reservation boundaries. This Court analyzed the Crow Tribe's powers and concluded that the question of whether the Crow Tribe had the power to exercise civil subject matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed by

Oliphant.[13] Unlike Oliphant, Congress had enacted no legislation granting federal courts jurisdiction over on-reservation civil disputes between Indians and non-Indians. 471 U.S. at 854. This Court drew upon an 1855 opinion of Attorney General Cushing:

> Now, it is admitted on all hands . . . that Congress has 'paramount right' to legislate in regard to this question, in all its relations. *It has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters. . . . By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Chocktaw Nation.*

National Farmers, 471 U.S. at 855, quoting 7 Op. Att'y Gen. 175, 179-81 (1855)(emphasis added). This Court went on to observe that, "[i]n the civil field, however, Congress has never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country." Id. at 855 n.17 (citations omitted). In addition, while treaties between the federal government and Indian tribes sometimes required tribes to surrender non-Indian criminal offenders to state or federal authorities, "Indian treaties did not contain provision for tribal relinquishment of civil jurisdiction over non-Indians." Id. (citations omitted).

Similarly, in Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987), this Court abstained from determining tribal court jurisdiction but gave direction to the tribal court on the governing law. In a strong recognition of tribal power, the Court observed that civil jurisdiction over non-Indian activities "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." Id., citing Merrion, 455 U.S. at

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[13] Oliphant held that Indian tribes do not have "inherent" powers to prosecute and convict non-Indians except in a manner acceptable to Congress. 435 U.S. 191 (1978). *See infra* at 10-11, 26, 28 n.27.

149 n.14; see also Santa Clara Pueblo, 436 U.S. at 60 ("proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent").

B. Tribal Regulatory Jurisdiction. Tribes also have a long-recognized right to exercise regulatory jurisdiction over the conduct of non-members on tribal trust lands. In Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), this Court upheld a cigarette tax assessed by the Colville, Makah, and Lummi Tribes on non-member purchases. 447 U.S. at 152-54. Analyzing the Tribes' powers, the Court first recognized the longstanding principle of tribal sovereignty that tribes may exercise jurisdiction over non-members conducting business affairs on reservation lands. Id. In this regard, the taxing power of tribes is "an essential instrument of self-government and territorial management." Id. at 153; see also Merrion, 455 U.S. at 141. Quoting an influential 1934 Interior Solicitor's opinion, the Court observed that, in the absence of congressional action to the contrary, the tribes' sovereign power to tax "may be exercised over members of the tribe and non-members, so far as non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." Colville, 447 U.S. at 153, quoting *Powers of Indian Tribes*, 55 Interior Dec. 14, 46 (1934). Turning then to the search for any potential divestiture, the Court found none: "[T]he widely held understanding within Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power." 447 U.S. at 153.

In reaching its conclusion, the Colville Court adopted the reasoning of Buster v. Wright, 135 F. 947 (8th Cir. 1905), which involved the tribal regulation of non-members on fee lands within reservation boundaries. In Buster, deeds to individual lots in Indian territory had been granted to non-Indian residents, who incorporated cities and towns. As a result, Congress had expressly prohibited the Tribe from removing these non-residents from the reservation. Even though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the court upheld the Tribe's retained power to tax:

> Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.

135 F. at 952. Working from this premise, the Colville Court also rejected the contention that tribal taxing powers have been "implicitly divested" by virtue of the tribes' "dependent status":

> Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protection of the Bill of Rights. . . . In the present cases, we can see no overriding federal interest that would *necessarily be frustrated* by tribal taxation. And even if the State's interests were implicated by the tribal taxes, a question we need not decide, it must be remembered that tribal sovereignty is dependent on, and subordinate to, *only the Federal Government, not the States*.

447 U.S. at 153-54 (emphasis added) (citations omitted).

In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), this Court followed Colville and upheld a tribal tax on non-Indians extracting oil from reservation lands pursuant to leases with the Jicarilla Apache Tribe. The Court recognized that the Jicarilla Apache Tribe has the authority to regulate non-members within its reservation boundaries based upon two separate powers: the Tribe's treaty "landowner" power to exclude non-members from its territory, and the Tribe's independent source of inherent tribal sovereign power to raise revenues and govern its territory. 455 U.S. at 137. The Court then examined relevant congressional action and found no explicit congressional divestiture of the Tribe's powers that gave rise to the power to tax. The mere fact that the Tribe gave up certain

"landowner" rights in the leases was insufficient to establish a divestiture of the Tribe's power to tax, particularly since a tribe's power to tax derives from its sovereign power to govern and manage its territory. Id. at 141. Again citing Buster v. Wright, the Court held that Congress's alienation of reservation land from tribal "ownership" did not divest the Tribe of its sovereign power to tax that land to raise revenues to support its territorial governance. Id.

In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), this Court upheld the Tribe's exclusive authority to regulate hunting and fishing by all persons on the reservation, including non-members. The Tribe had treaty and inherent sovereign powers to regulate reservation resources, including its wildlife. Id. at 337. Significantly, the Court relied upon Montana, stating: "As to 'lands belonging to the Tribe or held by the United States in trust for the Tribe,' we 'readily agree' that a Tribe may 'prohibit non-members from hunting or fishing . . . [or] condition their entry by charging a fee or establish bag and creel limits.'" Id. at 331, quoting Montana, 450 U.S. at 557.[14] The Court further determined that Congress had not divested the Tribe of jurisdiction. To the contrary, federal policy favored tribal self-government, which included the exclusive management of the Reservation wildlife resources.

In sum, Indian tribes are sovereign governments with vast responsibility to provide an array of governmental services to both tribal members and non-members on reservations. Since the early 1800s, this Court properly has been careful to limit the instances of intrusions into tribal inherent authority, thereby providing tribes the necessary latitude to provide those governmental services and protections. Absent clear congressional intent to limit tribal sovereignty, or an overriding national interest as that term has been previously defined by this Court, tribes retain inherent sovereign authority over their territory and all persons within it.

[14]In a distinction *amici* believe was dictum and unnecessary to decide the case, *see* Point II *infra*, this Court distinguished Montana, stating that Montana does not control questions concerning the exercise of tribal jurisdiction over non-members on tribal lands or tribal trust lands, because that decision involved fee lands that were alienated from tribal ownership. 462 U.S. at 330.

POINT II

THE DECISION OF THE COURT BELOW IS INCONSISTENT WITH THIS COURT'S HISTORIC TREATMENT OF TRIBAL JURISDICTION AND MUST BE REVERSED

Correct application of the foregoing authorities compels the conclusion that the Tribal Court of the Three Tribes has jurisdiction to hear Mrs. Fredericks' action against A-1 Contractors and Lyle Stockert. Of equal concern to the *amici*, proper construction of the relevant authority compels rejection of the Eighth Circuit's stingy view of tribal jurisdiction and a reaffirmation of the crucial role tribal courts play in the tribes' sovereign right and responsibility to protect all people with their territory.

A. On Its Facts, This Case Was Wrongly Decided.[15]

This Court need not and should not forge new ground in the annals of tribal jurisdiction. There is no need to create or resort to any broad rule. Based wholly on existing authority as interpreted by the Eighth Circuit, the Eighth Circuit erroneously applied that law to these facts.

Plaintiff Fredericks, although a non-member, is the widow and mother of enrolled tribal members and a longstanding resident of the Reservation. To put Mrs. Fredericks outside the protection of her family's tribe is a particularly odd and sad result. She and her tribal member children filed suit to recover damages for personal injuries sustained when Mrs. Fredericks' automobile collided with a gravel truck. The truck was driven by a non-member employee of a non-tribal company doing business on the Fort Berthold Reservation pursuant to a subcontract with a wholly-owned tribal entity. The

[15]*Amici* leave the laboring oar on this argument to Petitioners. Nonetheless, the facts of this case cry out so loudly for the assertion of tribal jurisdiction that *amici* are compelled at least to state the argument, no matter how sketchily.

automobile accident occurred within the Fort Berthold Reservation on a state highway constructed on the Three Tribes' trust lands pursuant to a right-of-way grant by the Secretary of the Interior pursuant to 25 U.S.C. § 323.

Looking first to congressional expression, Congress clearly has not acted to divest the Three Tribes of their powers to exercise civil jurisdiction over tort actions of this nature. The only conceivable congressional act implicated in this case is the federal statute that authorized the Secretary of the Interior to grant the right-of-way to establish the state highway where this accident occurred. This statute effected no divesture. Its sole function was to authorize the Secretary to grant rights-of-way across tribal trust lands, subject to conditions prescribed by the Secretary and the consent of the tribe. 25 U.S.C. §§ 323, 324 (1983). Nothing in this scheme explicitly or implicitly divests a tribe of its sovereign right to exercise jurisdiction over land that remains wholly tribal territory.[16]

The Eighth Circuit held that, despite the lack of express congressional divestiture, this case was governed by Montana.[17] Reading Montana to require *per se* general divestiture of tribal jurisdiction absent the presence of one of two "exceptions," the court held that the facts of the case here met neither of the exceptions and therefore required divestiture. *Amici* respectfully disagree, and believe that, even if the court correctly read Montana to establish only two situations permitting tribal jurisdiction (a proposition with which *amici* do not agree), the facts of this case positively leap off the page in their satisfaction of those conditions.

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[16]Drawing upon the principles of property law, courts have compared grants of right-of-ways with the granting of an easement, which does not extinguish the underlying title. Application of Konaha, 131 F.2d 737 (7th Cir. 1942); In re Fredenberg, 65 F. Supp. 4 (D. Wis. 1946); State v. Begay, 63 N.M. 409, 320 P.2d 1017, cert. denied, 357 U.S. 918 (1958). Thus, the title and possessory interest in the land upon which the state highway is established pursuant to a rights-of-way remains vested in the Tribe. State v. Begay, 63 N.M. at 412, 320 P.2d at 1019.

[17]Montana v. United States, 450 U.S. 544 (1981), is addressed in greater detail *infra* at 21-30.

The Eighth Circuit read Montana to require divestiture except in the following two instances: (1) when non-members enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; or (2) when a non-member's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. A-1 Contractors v. Strate, 76 F.3d 930, 935 (8th Cir. 1996), quoting Montana, 450 U.S. at 565-66 (citations omitted). Although *amici* vehemently disagree that this was intended by Montana, nonetheless, the facts of this case meet both.

First, both plaintiffs and defendants here established domestic and commercial relationships that clearly reflect consensual conduct. Mrs. Fredericks resided on the Reservation for over forty years, and enjoyed the protections and programs of tribal government. Her five adult children, who are claimants in the action, are enrolled members of the Three Tribes, as was her deceased husband. The defendant contractor had entered into a contract with a tribal corporation to perform work on a tribal community building located on the Reservation. Its employee, the defendant driver, was driving the company truck on reservation land when he collided with Mrs. Fredericks. But for the defendant contractor's consensual relationship with the Three Tribes, this accident never would have occurred. Thus, through marriage, motherhood, and contract, these parties had consensually entered into personal and commercial relationships with a strong and foreseeable nexus to the Three Tribes and its territory.

Second, the non-members' conduct giving rise to this action has "some direct effect" on the general health and welfare of the Three Tribes. The Three Tribes surely have a health and safety interest in *all* persons' operation of motor vehicles on highways situated on the Reservation and their consequent liability. The ability of the Tribal Court to adjudicate an action relating to the operation of motor vehicles on highways running through the Reservation directly affects the Three Tribes' sovereign interests and responsibility to protect the

health and safety of its members.[18] This sovereign interest equally extends to non-member residents and those who are compelled to enter the Reservation under contract, in addition to all those who voluntarily enter the Reservation for domestic or commercial purposes. In an on-reservation accident, tribal police and emergency vehicles typically, will respond to secure the roadway and transport the victims, regardless of race. Other tribal services likely would be required, such as counseling or temporary housing. And, here, tribal members and tribal programs certainly will be involved in Mrs. Fredericks' rehabilitation and future care, as she is inextricably involved in tribal life. Thus, the accident giving rise to this tort action directly affects the Three Tribes' interest in protecting the health and welfare of all those who enter its sovereign territory.

The Ninth Circuit recently applied the Montana factors differently--and correctly--on virtually identical facts. In Hinshaw v. Mahler, 28 F.3d 106 (9th Cir.), cert. denied, 115 S. Ct. 485 (1994),[19] the court upheld tribal court jurisdiction over a tort action arising from an on-reservation automobile accident. The individuals involved in the accident resided on the Reservation but were not members of the Confederated Salish and Kootenai Tribes of the Flathead Reservation. 42 F.3d at 1179-80. A tribal member and a non-member brought suit in tribal court, asserting wrongful death and survivorship claims on behalf of their deceased son against the non-Indian tortfeasor. Id. at 1180. The non-member defendant challenged the tribal court's jurisdiction. The tribal court concluded that it had jurisdiction because the accident occurred on the Reservation and because one of the plaintiffs was an enrolled tribal member, id., and that determination of jurisdiction was affirmed by the tribal appellate court and the United States District Court for the District of Montana. Id. at 1179-80.

[18]The Three Tribes explicitly exercises its civil jurisdiction by regulating certain civil traffic offenses on the Reservation, Code of Laws of the Three Affiliated Tribes, Ch. 4-A, including the seasonal use on all highways on the Reservation. Id., Ch. 28, §§ 1.02, 1.10, and 1.11.

[19]This decision is published at 42 F.3d 1178 (9th Cir. 1994).

Affirming tribal court jurisdiction, the Ninth Circuit cited Montana for the proposition that tribes retain civil authority over matters affecting the tribe. Id. at 1180. Relying upon Montana and National Farmers, the court concluded that "[c]learly, the Tribes have not surrendered their authority to exercise jurisdiction over civil actions involving non-members." Id. The Ninth Circuit went on to find that the Tribes' ordinance specifically provided for concurrent jurisdiction over certain civil matters on the reservation, including the operation of motor vehicles on public roads. Id. Thus, the Ninth Circuit correctly concluded that the Tribes' inherent authority supported the exercise of civil jurisdiction over the action, and the action fell squarely within the scope of the tribal ordinance conferring jurisdiction. The Eighth Circuit should have reached the same conclusion.

B. The *Montana* Decision And The Need For Clarification.

In 1981, this Court decided Montana v. United States, 450 U.S. 544 (1981). Like a hydra on hormones, that decision has spawned theories and "rules" that have grown far afield from their original context and do not necessarily flow logically from it. *Amici* believe that, properly viewed, Montana is but one in a long line of cases, not a watershed rule spelling the demise of tribal jurisdiction. Because, however, the myth of Montana has been so widely (and erroneously) read to introduce a nearly *per se* rule of implicit general divestiture, *amici* urge the Court to clarify what that decision in fact means.

In Montana, this Court was confronted with an apparently unfortunate and uniquely unwise exercise of civil authority by the Crow Tribe over non-member activities on fee lands located within the Reservation. The Crow Tribe enacted an ordinance that permitted members to fish and hunt on Reservation lands but completely prohibited non-members from fishing and hunting on Reservation lands, *including land owned in fee by non-members*. The record established that the State of Montana stocked the Reservation waters with fish, and the Tribe had not in the past challenged the state's "near exclusive" regulation of hunting and fishing on the fee lands. Nothing in the record suggested, much less established, that the prohibitory regulation related to the subsistence needs or welfare of the Crow Tribe.

This Court clearly and understandably was troubled by the inequitable and harsh prohibition imposed on non-members and drew upon its similar concerns in Oliphant.[20] While recognizing that Oliphant involved the exercise of tribal criminal jurisdiction over non-Indians, this Court nonetheless concluded that the general proposition of Oliphant had some bearing in the civil context: by submitting to the overriding sovereignty of the United States, Indian tribes necessarily give up their power to regulate non-Indian citizens of the United States except in a manner acceptable to Congress. 450 U.S. at 565. The exercise of civil jurisdiction over non-members in a manner that appears wholly arbitrary and capricious threatens the sovereignty of the United States and thus cannot be recognized as an inherent power of a dependent sovereign. Montana, 450 U.S. at 563-66. This concept presents no departure from established theory.

The Court next examined the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq*. (1983), and the Crow Allotment Act of 1920, 41 Stat. 751, and found no explicit divestment of the sovereign power to impose territorial regulation. 450 U.S. at 557-59. However, the Court *did* conclude that, by alienating the formerly tribal land to fee status, Congress intended to grant certain "landowner" powers of reasonable use and possession to the non-member fee holders. Going further, the Court concluded that the grant of those "landowner" powers necessarily divested tribes of the treaty power to exclude, *i.e.*, to exercise unbridled "landowner" powers over the non-member-owned fee lands. The Court viewed the tribal prohibition essentially as an improper exclusion of the non-members from their lands. Id. at 559.

As the above recitation demonstrates, nothing in the actual holding of Montana effected or requires the virtual obliteration of tribal jurisdiction over non-members. To the contrary, Montana reaffirmed the essential territorial aspect of tribal sovereignty by recognizing that, in spite of a congressional limitation on a tribe's treaty exclusion power, tribes nevertheless possess and retain inherent sovereign jurisdiction over non-member conduct on non-member-owned fee lands. In unnecessarily broad language that over the

[20]Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

course of time has become enshrined as a wholly unwarranted rule, the Court enumerated two instances where tribes clearly and undisputedly retain their inherent sovereign jurisdiction over non-members: (1) where non-members submit to tribal jurisdiction through a "consensual relationship," and (2) where non-members' activities on fee lands have "some direct effect" on a tribal interest in governing its members or territory. Neither of these instances is exhaustive, and both can be interpreted narrowly or broadly. 450 U.S. at 565-66. *Amici* submit that courts in general, and the court below in particular, have gutted tribal jurisdiction by giving the foregoing Montana factors an unnecessarily and unwarranted narrow interpretation.

C. *Montana* Has Been Misinterpreted and Misapplied.

1. Montana Does Not Support The Broad Rule Attributed To It.

Amici submit that Montana has been interpreted and applied in ways not intended by the Court or warranted by its facts. The resulting myth of Montana has caused confusion and great uncertainty. Respondents and the court below contend that this Court established a new rule of automatic, *per se* general divestiture. Articulating its view of that rule, the court below flatly maintains that "inherent sovereign powers do not extend to the activities of non-members." A-1 Contractors, 76 F.3d at 939. In this view, congressional action (or failure to act) is, for all practical purposes, irrelevant: a tribe may exercise civil jurisdiction over non-members *only* if it satisfies one of the two limited Montana "exceptions." Id.

The Eighth Circuit frankly admits that its interpretation of Montana "create[s] tension" with other of this Court's decisions, including Iowa Mutual, Williams, and Merrion. 76 F.3d at 938-39. To reconcile this tension, the Court fashioned a new, comprehensive, and integrated rule:

> [A] valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over

> the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.

Id. at 939.

This "new" rule effectively abolishes tribal sovereignty. It deprives tribes of bedrock, certain powers over their territory and non-members. It proceeds from a presumption against tribal jurisdiction rather than a presumption in favor of its existence. It perpetuates the practice of chipping away at tribal powers by the careless use of unnecessary language, in this case by introducing the wholly unprecedented requirement of a "valid" tribal interest. And, most staggeringly, it renders Congress irrelevant. This rule distorts Montana and overturns over one hundred and fifty years of precedent.

Montana cannot serve as a springboard for so radical a rule. That case made no pretense of standing as controlling precedent for all determinations of tribal civil jurisdiction over non-members. Were Montana intended to be so read, Iowa Mutual and National Farmers would have been the perfect places to say so. Instead, rather than casting a determinative shadow over those cases, Montana appeared as minor, *supporting* authority.[21] At neither its birth nor in later applications did this Court envision Montana as establishing a new rule of general applicability for all determinations of tribal jurisdiction over non-members. Rather, the lower courts have extended it far beyond its original contours and intent. Thus,

[21]In Iowa Mutual, this Court cited Montana as support for the general proposition that tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. 480 U.S. at 18. In National Farmers, Montana appeared only in a footnote, as an example of the type of decisions this Court has made regarding the power of tribes to regulate the affairs on non-Indians on reservation lands. 471 U.S. at 851 n.12.

as matters now stand, Montana can be cited to support anything and everything and must be clarified.[22]

2. Montana Fundamentally Was Concerned With Protecting Non-Members' Federal Constitutional Rights.

In order to assess what Montana really stands for, it is instructive to look closely at the subtext of what was really going on. Montana presented the Court with a troubling factual situation. A tribal regulation regulated different classes of on-reservation landowners differently: tribal members living on trust land were permitted to hunt and fish on their property; non-tribal members owning on-reservation fee land were entirely prohibited from hunting and fishing, even on the land they owned.

In federal constitutional terms, this apparent discriminatory treatment violated the non-members' Fourteenth Amendment equal protection rights. Tribes, however, are not bound by the Fourteenth

[22]This confusion is manifest from the wildly varying analyses applied by a single circuit since issuance of the Montana decision. In Confederated Salish & Kootenai Tribes, et al. v. Namen, 665 F.2d 951 (9th Cir.), cert. denied sub nom. Polson v. Confederated Salish & Kootenai Tribes, 459 U.S. 977 (1982), the Ninth Circuit interpreted Montana to uphold the tribes' power to regulate the conduct of non-Indians owning land bordering the lake beds designated as part of the reservation in the 1855 Treaty with the tribes. In Hinshaw v. Mahler, 42 F.3d 1178, 1180 (9th Cir.), cert. denied, 115 S. Ct. 485 (1994), the court upheld the tribe's exercise of jurisdiction over a tort action in a case virtually identical to the case at bar, relying on Montana as support for the proposition that "[c]learly, the Tribes have not surrendered their authority to exercise jurisdiction over civil actions involving non-members." In Yellowstone County v. Pease, No. 95-36026, 1996 WL 512363 (9th Cir. Sept. 11, 1996), the court relied on Montana (and the Eighth Circuit's decision below) to deny tribal court subject matter jurisdiction over an action challenging a county's right to impose property taxes on reservation land held in fee by a member of the tribe. Id. 1996 WL 512363, at *5, citing FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991).

Amendment (or, indeed, by the Constitution at all).[23] Faced with an unacceptable deprivation of United States citizens' constitutional rights, this Court had to find a way to protect those rights.

The Court had faced an identical concern in Oliphant, where, because of the non-applicability of the U.S. Constitution to tribes, the Tribal Court was not required to and did not provide criminal defendants with certain constitutional safeguards that federal and state courts provide. Unwilling to permit the Tribal Court to deprive non-member citizens of protections analogous to their federal constitutional rights, the Court found that Congress had intruded on the sovereignty of tribes in the criminal context by asserting federal jurisdiction over certain crimes, such as the Major Crimes Act, 18 U.S.C. § 1153 (1996 Supp.). More squarely, the Court made it clear that the protection of national citizens under the Bill of Rights, especially in the context of criminal matters, is a paramount national interest, and that any unremedied tribal action that deprives a citizen of such a right conflicts with the "overriding sovereignty" of the federal government. Oliphant, 435 U.S. at 209.

Faced in Montana with the Crow Tribe's unacceptable deprivation of the non-member residents' equal protection right to hunt and fish on their property, the Court looked to Oliphant as its analytical model.[24] First it searched for a congressional enactment that might be interpreted as withdrawing tribal power. It found such limited authority in the General Allotment Act, 25 U.S.C. §§ 331 *et seq.* (1983) and the Crow Allotment Act of 1920, 41 Stat. 751. By these Acts, Congress had withdrawn certain tribal land and opened it up to alienation to non-tribal members. In the Crow case, the allotments remained within the exterior boundaries of the Crow

[23]Instead, tribes are bound by the Indian Civil Rights Act, which offers constitutional-type protections and contemplates remedies in tribal forums. Tribal Constitutions often offer similar protections.

[24]The Montana record is unclear as to why the non-members did not challenge the Tribe's action under the Indian Civil Rights Act, as this law prohibits tribes from denying any person the equal protection of the tribal laws. Montana may not have been necessary if the non-members had exhausted their tribal remedies.

Reservation, thus remaining part of the Reservation and, as conceded by the Court, still subject to tribal regulation.

Looking to the General Allotment Act, the Court concluded that, by enabling non-members to obtain fee title to land within the Reservation, Congress had indeed intended to withdraw from the tribes certain treaty powers as "landowner" over that land. Specifically, the Tribes' power under the 1868 treaty to restrict or prohibit non-Indian hunting and fishing on the Reservation, as an exercise of their right to exclude, could no longer apply to lands held in fee by non-Indians. Montana, 450 U.S. at 559. Notably, however, as an exercise of their right to exclude, the only powers Congress withdrew were the tribes' "landowner" possessory rights, thereby divesting tribes of their right to remove non-members from fee lands within the reservation or to prohibit absolutely their use. The General Allotment Act did not divest tribes of their *sovereign, regulatory* power over the fee lands within their territory.

Recognizing that Congress's divestiture of certain "landowner" treaty powers did not withdraw tribes' sovereign regulatory power over non-members on fee lands within reservation territory, this Court drew upon Oliphant to provide a means for full protection of the United States citizens' rights against the discriminatory tribal regulation. Id. at 565. Specifically, Oliphant supports the general proposition that a tribe lacks inherent power to impose discriminatory tribal regulation, unless either non-members submit to tribal jurisdiction through their activities or the regulation has some rational relationship to a tribal government interest. Id. at 565-66. Absent those circumstances, discriminatory regulation is "necessarily inconsistent" with the overriding national interests.

Thus, Montana is wholly consistent with Oliphant in its view that it is beyond the power of a tribal government to deprive a non-member of a federal constitutional right. The real problem with Montana is that an arguably valid concern about a violation of non-members' constitutional right to equal protection could have been directly addressed without taking the drastic step of implicitly divesting the tribe of jurisdiction in all circumstances. *Amici* submit that the Court had available to it, and should have relied on,

remedies afforded by Congress to protect the constitutional rights of non-members.[25]

That remedy lay in the Indian Civil Rights Act. Rather than appearing to strip the tribe of its inherent power to regulate the land and landowners within its reservation territory,[26] the Court could and should have held that the non-members' complaint about discriminatory regulation stated a claim under the ICRA and should have been heard, in the first instance, by the tribal court.[27]

The ICRA serves the dual purpose of facilitating tribal sovereignty and self-government, while insuring that tribal government is exercised in a manner largely consistent with the federal constitution. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978). While the ICRA does not incorporate each and every protection of the federal constitution, it unambiguously does impose

[25]For the sake of this argument only, *amici* assume that Montana intended to nullify the ICRA and gut tribal jurisdiction over non-members unless the tribe could establish one of the two enumerated "exceptions."

[26]*Amici*, like many lower courts, have frankly no idea what principle this Court intended to announce in Montana. The case was so fact specific that it is impossible to tell which of the several variables--unconstitutionally discriminatory conduct, occurring on fee (versus trust) land, directed against non-members--the Court found determinatively significant. What *amici* do believe is that, given the confluence of potentially significant facts, the use of Montana as a springboard for a broad general rule is misguided.

[27]Such a holding would not have conflicted with Oliphant. In Oliphant, compelling tribal compliance with and adjudication of a claim arising under the ICRA could not have fully protected a non-member criminal defendant, no matter how exemplary tribal enforcement, because the ICRA does not incorporate wholesale all of the U.S. Constitution's criminal safeguards. For example, even vigorous compliance with and enforcement of the ICRA could not guarantee a non-member criminal defendant of his Fifth Amendment right to a grand jury or Sixth Amendment right to counsel. Thus, tribal jurisdiction would be futile and exclusive federal jurisdiction was the only way to ensure a non-member defendant of his or her full measure of federal constitutional protection. That is *not* the case with the equal protection problem in Montana, because the ICRA does guarantee all persons within the reservation, non-members included, the full scope of due process and equal protection.

on tribal governments the obligation to extend due process and equal protection to each and every person within tribal territory. 25 U.S.C. § 1302(8). Thus, the discriminatory regulation challenged in Montana was fully cognizable under the ICRA. The Court could, and *amici* submit should, have remitted the case to tribal court first for determination under ICRA.

Amici submit that egregious situations like those presented in Oliphant and Montana can be fairly dealt with in an intellectually honest fashion with only slight fine-tuning to the Montana "rule." Specifically, *amici* submit the following test for inherent tribal jurisdiction over non-members for activities occurring on-reservation, whether on fee or trust lands:

> Tribes are presumed to have regulatory and adjudicatory jurisdiction over their territory and all persons living or conducting business or otherwise present within their territory, whether member or non-member, whether tribal trust land or fee land, *unless* either (i) Congress has expressly withdrawn the particular power asserted, or (ii) the tribe's exercise of such power over a non-member necessarily would conflict with an overriding national interest.

The potential violation of a non-member's federal constitutional rights would *not* necessarily constitute such an overriding national interest. To the extent that such a violation may be remedied in the tribal court in a suit under the ICRA, the national interest is served. The tribe has a valid interest in governing its territory and persons within its territory, and it tempers that interest by providing a tribal remedy in a tribal forum for violation of federal constitutional rights. Both the tribal and the national interests are served. Only (i) if the particular case raises a constitutional violation that by definition cannot be redressed through the ICRA (such as the right to a grand jury), or (ii) if the particular tribe does not provide a tribal forum to enforce compliance with the ICRA, does the "overriding national interest" require a federal remedy for vindication of such rights. Rather than strip the tribe of its jurisdiction over non-members, such a theory essentially pre-empts tribal jurisdiction in favor of the paramount federal interest.

The above theory would satisfactorily ensure a federal forum for egregious cases where fair justice simply cannot be done in a tribal court, while preserving the sovereignty and integrity of the tribal government. In the instant case, the theory also would require reversal of the Eighth Circuit's decision. There being no express congressional withdrawal of tribal power, nor any overriding national interest requiring implicit divestiture, the tribal court retained its inherent, sovereign jurisdiction to adjudicate Mrs. Fredericks' tort claim against A-1 Contractors and Lyle Stockert. *Amici* respectfully ask this Court to clarify Montana by adopting the above rule.

CONCLUSION

Based upon foregoing, *amici curiae* ask this Court to reverse the majority decision of the court below, reject the "comprehensive and integrated rule" applied by that court, and clarify its holding in Montana to reaffirm the presumption of tribal jurisdiction over non-members within the exterior boundaries of the reservation, absent express congressional withdrawal of such jurisdiction or a clearly paramount national interest.

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